

September 14 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA**IN THE SUPREME COURT OF THE STATE OF MONTANA**
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a
Montana limited partnership; PLAINS GRAINS, INC., a
Montana corporation; ROBERT E. LASSILA and
EARLYNE A. LASSILA; KEVIN D. LASSILA and
STEFFANI J. LASSILA; KERRY ANN (LASSILA)
FRAZER; DARYLE E. LASSILA and LINDA K.
LASSILA; DOROTHY LASSILA; DAN LASSILA;
NANCY LASSILA BIRTHWISTLE; CHIRSTOPHER
LASSILA; JOSEPH W. KANTOLA and MYRNA R.
KANTOLA; KENT HOLTZ; HOLTZ FARMS, INC., a
Montana corporation; MEADOWLARK FARMS, a
Montana partnership; JON C. KANTOROWICZ and
CHARLOTTE KANTOROWICZ; JAMES FELDMAN
and COURTNEY FELDMAN; DAVID P. ROEHM and
CLAIRE M. ROEHM; DENNIS N. WARD and
LaLONNIE WARD; JANNY KINION-MAY; C LAZY J
RANCH; CHARLES BUMGARNER and KARLA
BUMGARNER; CARL W. MEHMKE and MARTHA
MEHMKE; WALTER MEHMKE and ROBIN
MEHMKE; LOUISIANA LAND & LIVESTOCK,
LLC., a limited liability corporation; GWIN FAMILY
TRUST, U/A DATED SEPTMENT 20, 1991; FORDER
LAND & CATTLE CO.; WAYNE W. FORDER and
DORTHY FORDER; CONN FORDER and JEANINE
FORDER; ROBERT E. VIHINEN AND PENNIE
VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN,
TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D.
FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF
THE JAYBE D. FLOYD LIVING TRUST; ROBERT M.
COLEMAN and HELEN A. COLEMAN; GARY
OWEN and KAY OWEN; RICHARD W. DOHRMAN
and ADELE B. DOHRMAN; CHARLES
CHRISTENSEN and YULIYA CHRISTENSEN;
WALKER S. SMITH, JR. and TAMMIE LYNEE
SMITH; JERMOME R. THILL; and MONTANA

FILED

SEP 14 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ENVIRONMENTAL INFORMATION CENTER, a
Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF
CASCADE COUNTY, the governing body of the County
of Cascade, acting by and through Peggy S. Beltrone,
Lance Olson and Joe Briggs,

Appellees,

And

SOUTHERN MONTANA ELECTRIC GENERATION
and TRANSMISSION COOPERATIVE, INC.; the
ESTATE OF DUANE L. URQUHART; MARY
URQUHART; SCOTT URQUHART; and LINDA
URQUHART,

Appellees/Cross-Appellants.

From the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

**MOTION OF NORTHERN PLAINS RESOURCE COUNCIL INC., TROUT
UNLIMITED INC., NATIONAL WILDLIFE FEDERATION, MONTANA
AUDUBON, THE SIERRA CLUB, CITIZENS FOR CLEAN ENERGY,
CITIZENS FOR A BETTER FLATHEAD, KILA-SMITH LAKE
COMMUNITY DEVELOPMENT COALITION, INC., GREATER
YELLOWSTONE COALITION, MONTANANS AGAINST TOXIC
BURNING, AND BITTERROOTERS FOR PLANNING FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF, AND BRIEF IN SUPPORT**

APPEARANCE:

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MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

The Applicants, Northern Plains Resource Council Inc., Trout Unlimited Inc., National Wildlife Federation, Montana Audubon, The Sierra Club, Citizens for Clean Energy, Citizens for a Better Flathead, Kila-Smith Lake Community Development Coalition, Inc., Greater Yellowstone Coalition, Montanans Against Toxic Burning, and Bitterrooters for Planning move this Court for leave to appear as amici curiae and to file an amicus curiae brief in accordance with Rule 12(7) of the Montana Rules of Appellate Procedure. Applicants desire to file a brief in opposition to the Motion to Dismiss. Council for Appellant has no objection. Appellees, Board of County Commissioners of Cascade County (Board) and Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME), oppose this motion to file an amici curiae brief. Northern Plains can file the brief by September 28, 2009. Each of the Applicants is briefly described below. Because Applicants' interest in this case stems from a common interest in citizen participation in land use and environmental law suits, the Applicants' interest in participating in this case is common to all of them, and set forth in Section B as a collective statement of all Applicants. If permitted to file an amicus brief, Applicants will support the Appellant and oppose the position advocated by SME in the motion to dismiss.

A. The Applicants.

All Applicants are 501(c)(3) non-profit organizations with members in Montana.

Northern Plains Resource Council. Northern Plains maintains its principal office in Billings, Montana and has members throughout the state. The organization is dedicated to grassroots conservation and family agriculture. Northern Plains organizes Montana citizens to protect local water quality, family farms and ranches, and Montana's unique quality of life. Northern Plains has often accessed the courts on behalf of its members to challenge government decisions.

The National Wildlife Federation (NWF). NWF is the nation's largest conservation organization, with over 5 million members nationwide, and thousands of Montana members active through local affiliates. NWF and its affiliates have a long history of citizen involvement in land use planning and participating in the legal process to enforce land use and environmental laws.

The Sierra Club. The Sierra Club is one of the nation's oldest and largest environmental organizations. It has thousands of Montana members in local chapters. The Sierra Club has advocated for wise land use planning and decision-making and remains at the forefront of enforcing environmental laws in state and federal courts.

Greater Yellowstone Coalition (GYC). GYC formed in 1983 by a group of citizens and scientists who were concerned about fragmentation of the land surrounding Yellowstone National Park. The group works on behalf of its 8,000 plus members on wildlife conservation throughout southwest Montana, including recent work on private land development or planning issues in Madison, Park and Gallatin Counties. GYC has advocated on a number of planning and zoning standard cases, including the case *Greater Yellowstone Coalition, Inc v. The Board of County Commissioners of Gallatin County*, 2001 MT 99.

Citizens for Clean Energy. Citizens for Clean Energy is a public interest, non-profit organization based in Great Falls, Montana, that is dedicated to promoting clean, efficient, cost- effective energy alternatives to coal-fired power. Over the past two years, CCE has led a public education campaign to inform Montana citizens and their elected officials about environmentally preferred alternatives to building the Highwood coal plant in Great Falls. CCE has opposed the zoning change and presented testimony and submitted extensive comments regarding the plant's adverse impacts on public health, local agriculture, and the Great Falls Portage National Historic Landmark, where the plant would be sited.

Montana Audubon (MA). MA is a statewide, grassroots non-profit organization based in Helena, Montana. Founded in 1976, MA currently has 9 local chapters and 3,800 members. The organization's mission is to promote

“appreciation, knowledge and conservation of native birds, other wildlife, and their habitats.” MA supports proper land use planning and citizen access to the courts.

Clark Fork Coalition (CFC). Founded in 1985, CFC is dedicated to protecting the Clark Fork River basin, a 22,000-square-mile area draining the waters of western Montana and northern Idaho. CFC’s goal is to create a healthy, vibrant river alongside healthy, vibrant communities. CFC promotes responsible land use planning and when appropriate uses the courts to enforce citizens’ rights. *Clark Fork Coalition, et al. v. Montana Department of Environmental Quality*, 2008 MT 407.

Citizens for a Better Flathead. Citizens was founded in 1992 to inform and empower citizens in cooperative community development that respects and encourages stewardship of the Flathead Valley's natural beauty and resources. Citizens has been involved with and supported litigation such as *Flathead Citizens for Responsible Growth v. Board of Adjustment*, to insure that citizens can access the courts and to promote sound land use planning in Montana.

Kila-Smith Lake Community Development Coalition, Inc. (Kila Coalition). Kila Coalition is a Montana nonprofit public benefit corporation dedicated to protecting the quality of life throughout the Flathead Valley by supporting sound planning for sensible growth, and where appropriate using the courts to enforce the law. Also included among Kila Coalition's purposes is educating citizens about the

values associated with economic vitality, quality of life, and natural resource conservation, while helping with the public assessment of development impacts on those same considerations.

Bitterrooters for Planning (BFP). BFP is a bipartisan group of Bitterroot Valley residents who support limited growth guided by responsible land use planning. We promote legislation that conserves and enhances a supportive economy, clean air, pure water, abundant wildlife, open space and scenic beauty, and an agricultural and rural lifestyle. When appropriate BFP uses the courts to protest unlawful government action. *Fish Hatchery Road Homeowners v. Board of County Commissioners*, 2001 Mont. Dist. LEXIS 3004.

Montanans against Toxic Burning (MATB). MATB is a grassroots citizens advocacy group founded in 1991 in response to a permit application submitted by Holcim (then Holnam) to burn liquid hazardous waste as fuel in its Trident cement kiln at the headwaters of the Missouri River in the Gallatin Valley. MATB is a broad-based group that includes health professionals, small business owners, farmers, ranchers, builders, and other concerned citizens. It supports citizen access to the courts.

Montana Trout Unlimited (TU). TU is a nation-wide organization dedicated to water quality protection, and Montana TU is its state chapter. Montana TU is actively engaged in issues affecting land use because of the undeniable connection

between sensible planning and watershed protection. Montana TU has used state and federal courts to further the organization's objectives when it believed that the government was not following the law.

B. Interest of the Applicants.

The Applicants' interest in the present case lies contrary to the position advocated by SME to dismiss the case for failing to seek a stay or injunction. Such a course of action exposes the citizens group to damages and may require it to post a bond. SME's interpretation of several Montana Supreme Court cases, and its position that Montana law requires an injunction or stay, threatens fundamental rights of access to the courts and undermines our Constitution. The Applicants support the right of citizens to challenge government land use decisions without fear of damages or a bond. Many of the Applicants have been engaged in litigation before this Court and understand the chilling effect of requiring a stay or an injunction before this Court will hear the merits of a land use case. For this reason, the Applicants desire to address the issues raised by the Motion to Dismiss. Applicants do not desire to brief the issues pertaining to the zoning decision.

The Montana Code requires a judge to impose on parties seeking an injunction "a written undertaking . . . for the payment of costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." MONT. CODE ANN. § 27-19-306(1) (2000). Thus, if a

party seeks an injunction or a stay pending appeal, that moving party will likely be required to secure a bond in conformity with the statute. In addition, the party in all cases is liable for damages caused by the stay. The practical result of requiring a stay or injunction chills citizen access to the courts. In the present case the district court correctly explained that “[a] stay would require a bond that would cover the prospective damages to Defendants due to delayed construction[]” and that the cost of such a bond “could be astronomical” *Plains Grains Ltd. P’ship v. Bd. of County Comm’rs of Cascade County*, No. BDV–08–480, slip op. at 11 (D. Mont. Dec. 1 2008). That holding is now being attacked on appeal through the Motion to Dismiss.

The bond requirement acts as a substantial deterrent for Applicants and other similarly situated parties. The threat of liability occasioned by requiring a stay or injunction has a profound chilling effect on citizen groups. The question goes to the heart of our Constitution and what it means to ordinary citizens who desire to hold their government accountable to the law. If our nation is, as Chief Justice Marshall opined over 200 years ago, “a government of laws and not of men” then citizens must be able to access the courts to protest unlawful government activity. *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803). The position advanced in this case by SME threatens to undermine those rights.

The Montana Constitution states “[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.” MONT. CONST. Art. II, § 16. This section of the Constitution has long been held to ensure citizens and citizen–groups access to “open courts.” *See Associated Press v. Montana Senate Republican Caucus*, 286 Mont. 172, 180 (Mont. 1997). The district court acknowledged that, “the rights afforded under Article II, Section 16 are worthless if they become dependent upon large expenditures of money[,]” which the statute requires for the injunction against the defendant SME. *Plains Grains Ltd. P’ship*, No. BDV-08-480, slip op. at 12 (D. Mont. Dec. 1 2008).

SME’s attempt to dismiss this case, thus requiring large bonds and exposure to damages suits will discourage all citizens from holding their government accountable in court. The Applicants represent thousands of Montana citizens and are concerned about the adverse impacts of poor land-use decisions that affect their quality of life. Improper and unlawful subdivision and zoning decisions affect the water quality, wildlife, vegetation, and other resources. Indeed, land-use decisions are increasingly inextricably linked to a “clean and healthful environment” guaranteed by Articles II and IX of the Montana Constitution. SME’s Motion to Dismiss, if granted by this Court, will significantly impede Applicants’ members’ access to courts to protect those constitutional rights.

C. Reasons Why an Amicus Brief is Desirable.

Applicants represent thousands of Montanans who support citizen access to the courts without the threat of posting a bond or being liable for damages. The collective experience of these groups in state and federal courts on this issue numbers in the hundreds of court cases. Applicants will bring their experiences and expertise to this Court for its consideration. The perspective of the Applicants is not matched by any party hereto.

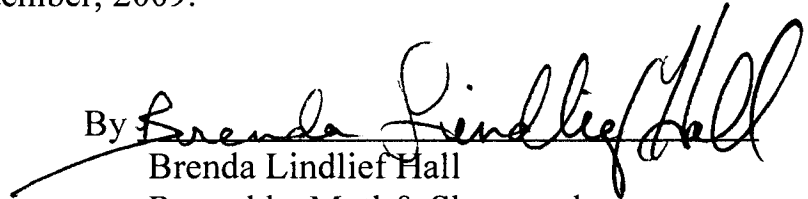
The Motion to Dismiss implicates several important constitutional issues: public access to the court system, MONT. CONST. Art. II, § 16; the inalienable right to a clean and healthful environment, MONT. CONST. Art. II, § 3; and the state's and its citizens' duty to maintain and improve a clean and healthful environment for present and future generations, MONT. CONST. Art. IX, § 1. If the position advocated in the Motion to Dismiss is adopted by this Court, it may effectively silence citizens from challenging their government to protect their environment. Such a decision will have profound implications not only in land use decisions, but in other environmental cases as well. Applicants will use their collective experience to explain to this Court why citizen access to the courts is not only a fundamental right, but is also a necessary check against abusive governmental power.

CONCLUSION

Applicants respectfully seek leave to file an amici curiae brief on September 28, 2009.

Dated this 14th day of September, 2009.

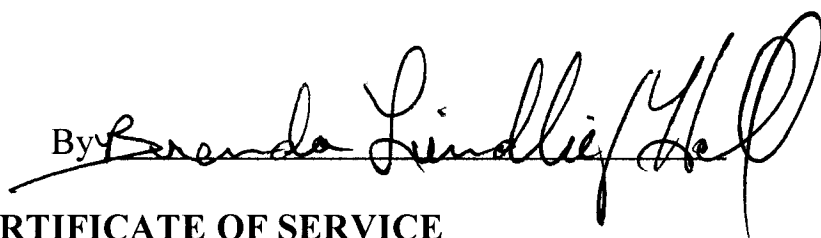
By

A handwritten signature in black ink, appearing to read "Brenda Lindlief Hall", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2004 for Mac is 2,029, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By 

CERTIFICATE OF SERVICE

I certify that on September 14, 2009 a true and correct copy of the foregoing was sent by U.S. mail, first class postage prepaid, to the following:

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